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DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

10,007

FILE: B-193562

DATE: May 3, 1979

MATTER OF: <sup>military member</sup> Retired uniformed services members  
~~receiving~~ compensation from foreign  
governments

DIGEST:

1. Section 509 of the Foreign Relations Authorization Act, Fiscal Year 1978, granting consent of Congress to the acceptance of foreign civil employment by certain officers of the United States, as required by Article I, section 9, clause 8 of the Constitution, *Cl. 8* cannot be retroactively applied to retirement pay withheld from an officer for a period he was employed by a foreign state without such consent which occurred prior to the effective date of section 509.
2. The consent of Congress to the acceptance of foreign civil employment and compensation by certain retired members of the uniformed services, as required by Article I, section 9, clause 8 of the Constitution, is granted in section 509 of the Foreign Relations Authorization Act, Fiscal Year 1978, which consent is conditioned upon approval of the employment by the Secretary of State and the Secretary of the service concerned. Such approval is only effective prospectively from the date it is granted and may not be made retroactively to authorize foreign employment and compensation received before the approval is granted. However, once approval is granted withholding of retired pay may be terminated and the payment of retired pay resumed on the date of approval.
3. The withholding of retired pay from a member of the uniformed services employed by a foreign government without the consent of Congress is based on the constitutional requirement for congressional consent to

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the receipt of emoluments from a foreign government, which requirement cannot be ignored. Substantial effect is given the constitutional mandate by withholding retired pay in an amount equal to the foreign emoluments received. The basis for the rule is that the emoluments are deemed accepted on behalf of the United States.

4. As with the constitutional provision prohibiting retired military officers from accepting emoluments from foreign governments without congressional consent, section 509 of the Foreign Relations Authorization Act, Fiscal Year 1978, which grants such consent, is silent as to any sanctions to be applied. Thus, the rule that retired pay is to be withheld in the amount of the foreign emoluments received is applicable to the law when approval is not granted. However, when approval is granted the legislative history is clear that Congress intended withholding of retired pay to terminate and payment of retired pay be resumed effective on the approval date.
5. Amounts of retired pay withheld from members of the uniformed services who accept foreign employment without congressional consent as required by the Constitution should be treated as though the members had no entitlement to them and should not be "held in trust" for them pending possible future congressional consent to their receipt.
6. The prohibition against receipt of emoluments "of any kind whatever" from a foreign government by retired member of the uniformed services, under Article I, section 9, clause 8 of the Constitution,

includes forms of compensation other than salary, such as free transportation, household goods shipments, housing allowances, etc. To determine the amount to be withheld from a member on account of such emoluments, they should be fairly valued considering the actual value of the emolument received.

By letter of November 16, 1978, the Assistant Secretary of the Navy (Financial Management) requested our opinion regarding the proper disbursement of funds withheld by the Department of the Navy from the retired pay of Lieutenant Commander Harry Bigham, USN (Retired), pursuant to our decisions applying the prohibition of Article I, section 9, clause 8 of the Constitution of the United States. The matter has been assigned number SS-N-1309 by the Department of Defense Military Pay and Allowance Committee.

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per name

Commander Bigham is a retired Regular officer of the United States Navy. In October 1976, he became an employee of Saudi Arabian Airlines (SAUDIA) as a result of the transfer of employees from Trans World Airlines, his prior employer, to SAUDIA. SAUDIA is a corporation owned by the Kingdom of Saudia Arabia.

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His tenure with SAUDIA placed him in contravention of the Constitution, Article I, section 9, clause 8, which provides:

"No Title of Nobility shall be granted by the United States: And, no Person holding any Office of Profit or Trust under them, shall, without the consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign state."

Retired Regular officers are members of the military service of the United States. United States v. Tyler, 105 U.S. 244 (1881), Hooper v. United States, 164 Ct. Cl. 151 (1964), and Puglisi v. United States, 564 F. 2d 403, 410 (Ct. Cl. 1977), cert. denied, 435 U.S. 968 (1978). Therefore, they are considered to be covered by the provision's prohibition against foreign employment without congressional consent and are subject to withholding of their retired pay in an amount equal to the amounts received from the foreign government. B-178538, October 13, 1977.

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In August 1977, Commander Bigham/petitioned the Secretary of the Navy and the Secretary of State for approval of his foreign employment pursuant to authority delegated to them by Congress in section 509 of the Foreign Relations Authorization Act, Fiscal Year 1978, Public Law 95-105, August 17, 1977, 91 Stat. 844, 859-860. Approval was granted to Commander Bigham by the Secretary of State on September 27, 1977, and by the Secretary of the Navy on March 30, 1978. The letters of approval did not specifically determine an effective date for the consent. In fact, Commander Bigham had been working for SAUDIA over a year prior to the effective date of section 509 of the Authorization Act which granted the approval authority to the Secretaries. The Navy has been withholding Commander Bigham's retired pay in order to equal the salary earned for the period of employment prior to the effective date of the approval.

The Assistant Secretary indicates that several issues have arisen concerning the application of section 509 of the Authorization Act and the amounts to be withheld from the retired pay of Commander Bigham and other members who have not secured approval of their foreign employment.

To resolve the Bigham case and the cases of those similarly situated, the Assistant Secretary of the Navy requests responses to several specific questions. Question (1) is--

"(1)(a) As a matter of statutory construction, could the consent granted by a Department Secretary pursuant to the authority delegated by Congress in Section 509 of the Foreign Relations Authorization Act, Fiscal Year 1978 be retroactive or must it operate prospectively only?

"(b) If in your opinion consent to foreign employment could apply retroactively, what, if any, limits would pertain to such application, e.g., (i) consent retroactive to the date of submission of the request for approval; (ii) consent retroactive to the effective date of the Foreign Relations Authorization Act, Fiscal Year 1978; or (iii) consent retroactive to the date employment began even if such date predated the effective date of the Foreign Relations Authorization Act?"

Sections 509(a) and (b) of the Authorization Act provide in part as follows:

"(a) Subject to the condition described in subsection (b) the consent of Congress is granted to--

(1) any retired member of the uniformed services,

\* \* \* \*

to accept any civil employment (and compensation therefor) with respect to which the consent of Congress is required by the last paragraph of section 9 of article I of the Constitution of the United States, relating to acceptance of emoluments, offices, or titles from a foreign government.

"(b) No individual described in subsection (a) may accept any employment or compensation described in such subsection unless the Secretary concerned and the Secretary of State approve such employment."

In our decision B-175166, April 7, 1978, after considering the language and legislative history of section 509, we held that it is prospective only and could not be construed as granting congressional consent to foreign employment which took place prior to its enactment, August 17, 1977.

As to whether the Secretaries' approval may be made retroactive to some date prior to such approval but on or after the effective date of the law, section 509(b) provides that no individual subject to its terms "may accept any [foreign government] employment or compensation" unless the Secretaries "approve such employment." The report of the Committee on International Relations, House of Representatives, states that section 509(b) specifies that the Secretaries' approval "is necessary prior to acceptance of foreign government employment." H.R. Report No. 95-231, 95th Cong., 1st Sess. 20 (1977). See also the remarks of Senator Thurmond to the same effect concerning S. 1351, a similar bill which he introduced in the Senate. 123 Cong. Rec. S6147 (daily ed., April 21, 1977).

Therefore, in answer to question (1)(a), it is our view that the consent granted under section 509 of the Authorization Act operates prospectively only. However, as with the constitutional provision

no specific sanction is applied when an individual accepts compensation in contravention of the law. Thus, it would appear that in instances where an individual accepts employment and compensation therefor and does not obtain secretarial approval, the position this Office has taken that in order to give substantial effect to the Constitutional prohibition retired pay in an amount equal to that received from the foreign government should be withheld, would continue to be applicable.

However, while the law is silent concerning any sanctions to be applied, the legislative history of the law does supply information concerning the intent of Congress when approval is granted, at least in the cases of individuals employed by foreign governments at the time the legislation was considered. In that regard, House Committee on Foreign Relations Report No. 95-231, 95th Cong., 1st Sess., Foreign Relations Authorization Act, FY. 1978, pages 20-21, states in part as follows:

"The committee is particularly concerned with problems facing American citizens currently employed by foreign governments, who are subject to the constitutional provision contained in Article I, section 9, clause 8 of the Constitution of the United States. But for the enactment of this section, and under a 1974 ruling of the Comptroller General, the individual's foreign salary would be set off against his retirement pay. It is the intention of the committee, that if such an employee obtains the approval specified in subsection (b) of this section, no reductions will be made from retirement benefits payable after such approval is granted. Given the unique circumstances applying to such individuals, the committee expects that the Secretary of State and the Secretary concerned will give expeditious consideration to the requests for such approval."

In view of this statement in the Committee Report it seems that the Committee and the Congress intended that if approval was granted, deductions from retired pay would cease at the time such approval was granted.

Accordingly, in instances where an individual secures the required approval, withholding of his retired pay may be discontinued effective the date when both Secretarial approvals have been granted.

In addition, it is our information that the Secretarial approval in certain instances has been delayed not because of considerations concerning the propriety of the employment itself, but rather due to questions concerning what effect section 509 of the Authorization Act would have on an individual's retired pay. If the Secretaries concerned determine such was the case and in those cases approve the employment effective no earlier than the date the application was received we would raise no objection.

In view of the answer to question (1)(a), no answer is necessary to question (1)(b).

Questions (2) and (3) are as follows:

"(2) Under your prior decisions, withholding of pay would result where the consent to the acceptance of foreign employment has not been obtained, or if, as in the instant case, consent is later obtained but you determine that such consent cannot be given retroactive application. It is not clear on what theory and authority withholding of a retired member's statutory entitlement to retired pay is based. Therefore, it is requested that the basis and authority for the withholding be specifically addressed.

"(3)(a) Based on the response to question (2), please elaborate on the nature of the withholding. Would the funds be treated as earned by the member, such that an obligation is recorded but the disbursing officer would be required to hold the funds in a trust account pending possible approval or consent by Congress, or should the matter be treated as if there were no entitlement and no special treatment given the funds.

(b) If, in response to question (1), it is determined that retroactive approval could be granted, then once approval is obtained, could the disbursing officer release all funds previously withheld from the retired member?"

We have held, in considering the language of the constitutional provision, that actions contrary to its mandate may not be ignored even though the Constitution itself does not provide for a specific

sanction. Thus, we held that substantial effect can be given the provision by withholding retired pay from a member who accepts foreign employment in violation of its prohibition in an amount equal to the present or emoluments received from the foreign government. See 44 Comp. Gen. 130, 131 (1964). See also B-178538, October 13, 1977, where the basis for and amount of the withholding were carefully reviewed and it was stated in part:

"It is our view that the rule expressed in 44 Comp. Gen. 130, supra, is more in line with the intent of the constitutional provision and does in fact give substantial effect to the prohibitions contained therein. That is, the constitutional provision states that without congressional consent a person holding an office of profit or trust under the United States may not accept 'any present, Emolument, Office or Title \* \* \*.' We have previously stated the applicable rule in terms of withholding retired pay in amounts equal to those received from the foreign government. The basis for such rule is that the emoluments are accepted on behalf of the United States. Our conclusion that a retired member does not lose his status by the acceptance of emoluments from a foreign state likewise is predicated on the same basis. Cf. 5 U.S.C. 7342."

We note also that Congress was aware of our interpretation of the sanction required by the constitutional provision at the time it enacted section 509 of the Authorization Act. Had it been considered that our interpretation was improper, Congress could have taken that opportunity to change or remove the sanction. It did not do so, except of course for those individuals for whom approval of their employment is granted under section 509. As we stated in our response to question (1), when approval is not granted retired pay should be withheld in an amount equal to that which is received from the foreign government. However, when an individual accepts employment with a foreign government and has made timely application for approval, retired pay need not be withheld once approval has been granted and payment of retired pay may be resumed on approval.

Question (2) is answered accordingly.

Regarding question (3)(a), as is stated in answer to question (1), if approval is granted to foreign employment under section 509 of the Authorization Act, it is not retroactively effective. Thus, the funds

withheld should be treated as if there were no entitlement to them and they should be given no special treatment.

In view of our other answers, question (3)(b) is answered in the negative.

Question (4) is as follows:

"(4)(a) In your prior decisions, withholding in an amount equal to the salary received from the foreign source was authorized to be withheld. However, as discussed in 44 Comp. Gen. 130 (1964), the language in the Constitution covers more than acceptance of salary. Therefore, is it correct to withhold pay in amounts equal to other elements of compensation such as free or reduced transportation, household goods shipments at employer expense, housing allowances, etc.?"

"(b) If it is determined that additional elements of compensation must be taken into consideration in determining the amount of the withholding, values based on best estimates furnished by the retired members will be placed on these elements. Due to the inflated cost of housing overseas, this item will be valued at either the actual cost in the foreign country or the fair market value of comparable housing prevailing at the retired member's last address for pay purposes, whichever is lower. Would you concur in this method of valuation? If not, what method of calculating the amounts to be withheld would be appropriate?"

The constitutional provision prohibits the acceptance by public officers of presents, emoluments, office or title, "of any kind whatever" from a foreign state. We have held that that wording requires the broadest possible scope and application. See 49 Comp. Gen. 819, 821 (1970), and B-178538, October 13, 1977. Thus, forms of compensation other than salary would fall within the prohibition, and question (4)(a) is answered in the affirmative.

Concerning the issues raised in question (4)(b) as to the value to be placed on nonmonetary elements of compensation, we believe such value should be set fairly, considering the actual value of the

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compensation received. The proposed method of evaluation is acceptable provided that the estimates furnished by the retired members are reviewed for obvious errors. Questionable cases may, of course, be submitted to our Office for decision.

  
Deputy Comptroller General  
of the United States